

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>CAROL E. LOPEZ</b>	)	
Claimant	)	
	)	
VS.	)	
	)	
<b>IMBC CORPORATION</b>	)	
Respondent	)	Docket No. 1,035,424
	)	
AND	)	
	)	
<b>TRAVELERS INDEMNITY CO. OF AMERICA</b>	)	
Insurance Carrier	)	

**ORDER**

Respondent requested review of the December 3, 2009 Award by Administrative Law Judge (ALJ) Marcia Yates Roberts. The Board heard oral argument on March 3, 2010.

**APPEARANCES**

Kevin J. Kruse, of Overland Park, Kansas, appeared for the claimant. Stephen P. Doherty, of Overland Park, Kansas, appeared for respondent and its insurance carrier (respondent).

**RECORD AND STIPULATIONS**

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument the parties agreed the ALJ erred in her method of converting and combining the stipulated 15 percent permanent partial impairment to the claimant's right hand with a whole body impairment. The parties agree that under the provisions of the 4<sup>th</sup> edition of the *AMA Guides*<sup>1</sup> the 15 percent impairment to the right hand is properly

---

<sup>1</sup> American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment*, (4<sup>th</sup> ed.). All references are to the 4<sup>th</sup> ed. of the *Guides* unless otherwise noted.

converted to 14 percent to the right upper extremity and if appropriate, the 14 percent to the right upper extremity is properly converted to an 8 percent permanent partial impairment to the whole body. To be clear, regardless of these stipulations respondent continues to argue that claimant's impairment is limited to 15 percent of the right upper extremity at the level of the hand.

### ISSUES

The ALJ awarded claimant a 18 percent permanent partial impairment for injuries found to have occurred as a result of her October 5, 2006 accidental injury. This impairment is comprised of a stipulated 15 percent permanent partial functional impairment to the right hand which was converted<sup>2</sup> and combined with a 10 percent permanent partial impairment to the whole body for claimant's post traumatic stress syndrome (PTSD).

Although identified in the record as an issue, the ALJ did not address respondent's contention that it was not liable for the cost of replacing claimant's prosthetic device which was lost while claimant was working for a subsequent employer. Pursuant to the parties' agreement, the Board can proceed and address the issue.

The respondent appealed the Award and contends the Board should modify the ALJ's findings. Respondent maintains that claimant failed to prove that she bears a psychological injury as a result of her compensable injury. Rather, respondent asserts that claimant has a preexisting history of depression and that claimant failed to prove that it was more likely than not that her present psychological condition was caused by her work-related accident, as testified to by Dr. Pronko. Respondent believes claimant's recovery in this claim should be limited to the 15 percent permanent partial impairment (to the hand) that the parties' agreed to before trial. Finally, respondent urges the Board to reconsider its earlier ruling and hold it harmless for the costs associated with the replacement of claimant's prosthesis, inasmuch as that prosthesis was lost while claimant was working for her subsequent employer.<sup>3</sup> Respondent argues claimant's subsequent employer should be held responsible for that loss.<sup>4</sup>

---

<sup>2</sup> As noted above, the parties agree the ALJ erred in her method of converting and combining the hand impairment with a whole body impairment and that error will be corrected herein.

<sup>3</sup> The ALJ's initial ruling on this dispute came following a preliminary hearing. Respondent appealed the ALJ's determination that respondent should bear the expense of replacing claimant's prosthesis. Respondent appealed that determination and pursuant to K.S.A. 44-551(i)(2)(A), a single board member considered the appeal and affirmed the ALJ's conclusion. Now, following a full hearing on this matter, the entire Board will conduct a de novo review.

<sup>4</sup> Respondent has, pursuant to the ALJ's preliminary hearing Order, provided the replacement prosthesis and therefore, would ask the Board to provide an order directing the Kansas Workers Compensation Fund to reimburse respondent the cost of that prosthesis pursuant to K.S.A. 44-534a(a)(2)(b); K.S.A. 44-556(d)(1).

Claimant contends the greater weight of the evidence establishes that she bears a 20 percent whole body impairment as a result of the psychological condition based upon the testimony offered by Dr. Pro. Thus, when the 15 percent functional impairment (to the hand) is properly converted and combined with the 20 percent, the resulting figure is 26 percent to the whole body pursuant to the combined values chart in the A.M.A. *Guides*. Claimant lastly argues that respondent is and should remain responsible for the costs incurred in replacing her prosthesis even though it was lost while claimant was working for another employer.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The ALJ's Award adequately and succinctly sets forth the facts and circumstances surrounding claimant's injury and the Board adopts that statement as its own and will reference only those facts which are pertinent to the Board's decision. Succinctly put, claimant sustained a significant work-related injury to her right hand when the machine she was using suddenly sliced off a portion of her little finger and injured her ring finger.

There remains only two issues to be decided in this appeal. First, whether claimant sustained a psychological injury as a result of her October 5, 2006 injury and if so, the nature and extent of that impairment in light of the parties' stipulated 15 percent impairment to the hand. Second, whether respondent should be responsible for the costs associated with replacing claimant's prosthesis which was lost while working for a subsequent employer.

Two physicians have testified and offered opinions as to claimant's psychiatric condition and those opinions, not surprisingly, widely differ. Dr. John D. Pro, a board certified psychiatrist, examined claimant in September 2008 at the request of claimant's attorney. Dr. Pro diagnosed PTSD with major depressive episodes and had no difficulty attributing this condition to claimant's work-related injury.<sup>5</sup> He further opined that she requires continued treatment for her condition and bears a 20 percent permanent partial impairment to the whole body based upon the 2<sup>nd</sup> and 4<sup>th</sup> editions of the *Guides*, thus reflecting a mild to moderate psychological impairment.

During the course of his deposition, Dr. Pro explained that since his initial evaluation he learned that claimant was prescribed Wellbutrin and later Effexor, a pharmaceutical that is known to aid in the treatment of depression, in connection with claimant's hysterectomy

---

<sup>5</sup> Pro Depo. at 19-20.

which took place well before her October 2006 accident<sup>6</sup>. He also explained that he was aware she had undergone a prophylactic bilateral breast removal procedure in order to minimize her chances of developing breast cancer.<sup>7</sup> She also went through a divorce shortly before beginning her job with this respondent, an event that claimant concedes made her sad for a short period of time, but also prompted her to press ahead and find alternative employment, seeking out a job with this respondent in the fall of 2006.

Dr. Pro testified that based upon his review of claimant's previous medical history and the records associated with that history, at no time had claimant received ongoing psychotherapy for depression following her hysterectomy and the ensuing menopausal condition. Rather, she was prescribed medications in response to a physician's conclusion that she appeared depressed. She was not diagnosed or treated by any psychiatrist or psychologist at any point before 2006. This was consistent with claimant's contention that she had not suffered from any psychological problems before her October 5, 2006 accident. In Dr. Pro's view, claimant had received pharmacological assistance in the form of Wellbutrin, a drug that is often used in conjunction with other medications for management of menopausal symptoms. Moreover, none of those facts altered his ultimate conclusion that claimant suffers from PTSD, as a result of her October 5, 2006 work-related accident and that her accident and the resulting PTSD have aggravated her depression symptoms.

In stark contrast to Dr. Pro's opinions are those offered by Dr. Michael J. Pronko, another board certified psychiatrist. Dr. Pronko saw claimant in June 2009 and after evaluating her and reviewing her past medical records, he concluded that claimant is currently depressed, but that she was suffering from depression long before October 2006. In his own words, he stated that there was "little sequelae to the traumatic amputation."<sup>8</sup> More importantly, he believes that while she may have had a short period of PTSD immediately following her accident, she no longer suffers from PTSD and is merely depressed, a condition that pre-dates her vocational injury and was caused by a multitude of other preexisting conditions. In support of his contention, he points to the fact that claimant was prescribed Welbutrin for depression years before the October 2006 accident. When pressed, he conceded that no other physician had actually *rated* claimant's depression before the October 2006 accident. Nonetheless, he was adamant that the traumatic amputation that occurred in October 2006 was far less significant than claimant's hysterectomy, her divorce and her decision to preemptively remove her breasts when faced with the likelihood of cancer.

---

<sup>6</sup> The date of this procedure is not within the record, but it seems to have been sometime in 1999 or 2000.

<sup>7</sup> Again, the date of this procedure is not disclosed, but also seems to have occurred sometime in 1999 or 2000.

<sup>8</sup> Pronko Depo. at 33.

After considering this evidence, the ALJ issued her Award and provided the following analysis:

Upon reviewing the entire medical record, it is clear that claimant does have some preexisting psychological disability that the doctors have been unable to quantify. Both Drs. Pro and Pronko feel that claimant needs additional psychotherapy to deal with the effects of her injury. The fact that Dr. Pronko does not believe that any of claimant's psychologic disability is ratable under the AMA Guides but does require psychiatric treatment is contradictory. On the other hand, Dr. Pro's assessment of 20% impairment, all attributable to the work-related injury, does not take into account her pre-existing psychological disability. Therefore, the court finds that claimant has sustained a mild impairment pursuant to the AMA Guides and is entitled to 10% permanent partial psychological impairment as a result of this injury.<sup>9</sup>

She went on to combine the 10 percent whole body impairment with the 15 percent impairment to the right hand, awarding claimant an 18 percent whole body impairment.

The Board has considered the entire record, along with the parties' arguments and concludes the ALJ's Award should be modified. A majority of the Board concludes that claimant has sustained a permanent partial psychological impairment due to PTSD which is due to the October 5, 2006 accident. The Board also finds that, with all due respect of the ALJ's conclusions, there is insufficient evidence within this record to conclude that claimant had a preexisting impairment due to depression.

The Workers Compensation Act provides that compensation awards should be reduced by the amount of preexisting functional impairment when the injury is an aggravation of a preexisting condition. The Act reads:

The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.<sup>10</sup>

The Board interprets the above statute to require that a ratable functional impairment must preexist the work-related accident. The statute does not require that the functional impairment be rated or that the individual was given formal medical restrictions. But it is critical that the preexisting condition actually constitute an impairment in that it somehow limited the individual's abilities or activities. An unknown, nondisabling condition that is not

---

<sup>9</sup> ALJ Award (Dec. 3, 2009) at 5.

<sup>10</sup> K.S.A. 2006 Supp. 44-501(c).

ratable under the *AMA Guides* cannot serve as a basis to reduce an award under the above statute.

A physician may appropriately assign a functional impairment rating for a preexisting condition that had not been rated. However, the physician must use the claimant's contemporaneous medical records regarding the prior condition. The medical condition diagnosed in those records and the evidence of the claimant's subsequent activities and treatment must then be the basis of the impairment rating using the appropriate edition of the *AMA Guides*.

Here, neither Dr. Pronko, nor Dr. Pro were able to assign any definitive preexisting impairment for claimant's purported preexisting depression. In fact, Dr. Pro is of the opinion that claimant was simply being treated for her post-menopausal symptoms, not true depression. In any event, it is uncontroverted that no physician ever rated claimant's purported depression before October 2006 and in fact, claimant wasn't even aware that any of her earlier physicians had diagnosed any sort of depression. She seemed to be aware that she was prescribed Wellbutrin, but that prescription came in connection with the hysterectomy and the need to manage the symptoms she associated with that procedure. Dr. Pro explained that Wellbutrin is often used in just that context. Admittedly, there was a short period where the Wellbutrin was increased, just after her marriage dissolved, but there is nothing in this record that would suggest that her symptoms at that time were of the degree or intensity that she now experiences post-accident. Claimant testified that her sleep patterns have been disturbed since her accident, beyond just that present due to her sleep apnea, and she now has difficulty with loud noises, at times experiences flashbacks, and has an overriding fear of losing her prosthesis.

Accordingly, the Board finds that, unlike the ALJ, this record fails to disclose any sort of preexisting impairment that would sufficiently justify a credit for claimant's current depression complaints. Moreover, the Board is persuaded by Dr. Pro's testimony that claimant suffers from PTSD as a result of her accident. Therefore, the Board adopts Dr. Pro's opinions, including his assessment of a 20 percent permanent partial impairment to the whole body.

The parties agreed that claimant bears a 15 percent impairment to the right hand. And when properly converted based upon the principles set forth in the *Guides*, this yields a 14 percent to the upper extremity. Respondent continues to maintain that even if claimant is found to have a compensable whole body impairment due to her psychological complaints, the Board is limited in its ability to combine that whole body impairment with the stipulated 15 percent scheduled impairment to the hand as respondent contends the process of converting the 15 percent to the hand (as required by the *Guides*) would increase the value of that separately scheduled impairment beyond the value reflected in the parties' stipulation. The majority of the Board disagrees.

The nature of an employee's work injury dictates the form of the award under the Workers Compensation Act. K.S.A. 44-510c provides compensation for temporary and permanent total disabilities. K.S.A. 44-510d and 44-510e provide compensation for permanent partial disabilities. K.S.A. 44-510d calculates the award based on a schedule of disabilities. If an injury is on the schedule, the amount of compensation in the schedule includes compensation for the complete loss of the member or the partial loss of the member.<sup>11</sup> The compensation for a scheduled disability is based on the schedule alone without regard to the claimant's loss in earning power.<sup>12</sup> For nonscheduled injuries, the award is calculated under K.S.A. 44-510e. A claimant with a permanent partial general disability pursuant to K.S.A. 44-510e is eligible to receive temporary total disability in addition to the compensation he or she may receive for the permanent partial disability.

Here, claimant's hand injury is contained with the statutory schedule set forth at K.S.A. 44-510d. But she sustained an additional permanent injury in the same accident, PTSD, an injury which is not found within the schedule and is compensated pursuant to K.S.A. 44-510e. Although the Board has struggled in the past with how to calculate the recovery in those injuries that involved both scheduled and nonscheduled injuries, the Court of Appeals has recently held that injuries that involve both a scheduled member and a nonscheduled portion of the body, compensation should be awarded under K.S.A. 44-510e.<sup>13</sup> And the *Guides* provide a method of appropriately converting and combining those ratings.

Following that precedent, the majority finds that claimant bears a 26 percent whole body impairment as a result of her October 5, 2006 accident. This includes a 20 percent whole body impairment for the PTSD combined with the stipulated 15 percent permanent impairment to the hand, which when converted, yields an 8 percent to the whole body.

Lastly, respondent argues that it should not be held liable for the cost to replace claimant's lost prosthesis. A single board member reviewed this issue during an earlier appeal. The underlying facts surrounding this issue remain the same.

Claimant has since left respondent's employ and now works for Wal-mart working with cold materials. While working for Wal-mart, claimant lost her prosthetic finger. Claimant does not know exactly when or how she lost the finger, only that she was

---

<sup>11</sup> K.S.A. 44-510d(a)(21)

<sup>12</sup> *Stephenson v. Sugar Creek Packing*, 250 Kan. 768, 771, 830 P.2d 41 (1992).

<sup>13</sup> *Goodell v. Tyson Fresh Meats*, (Unpublished Court of Appeals Decision No. 101,476 dated December 31, 2009), 220 P.3d 1114, 2009 WL 5206245.

working for Wal-mart at the time and that the loss occurred sometime between 5 and 6 a.m. and the finger has not been located.<sup>14</sup>

This testimony was reiterated at the regular hearing. Claimant went on to explain that while it is possible that she lost the finger while she was in the cold area when she was stocking, she had other duties during that hour elsewhere where the temperatures are more normal. She simply knows the time period when the finger was lost, not where the finger was lost. At regular hearing she also indicated that she had been told by the manufacturer of the prosthesis that the cold may have played a part, in that her skin may have shrunk due to the temperature, allowing the prosthesis to unexpectedly come off.<sup>15</sup>

Both the ALJ and a single board member found that respondent should be responsible for the replacement of the prosthesis. And while it was replaced, the loss of this device has, as evidenced by the medical records, given rise to additional anxiety and a flare up of claimant's PTSD symptoms. According to claimant, respondent's attitude towards her need for the prosthesis has been anything but charitable. Claimant testified that respondent's insurance adjuster told claimant that she would be provided with the requested 2 prostheses (one for work duties and another nicer prosthesis for other times) but beyond that, the carrier would be providing no further assistance or replacements. This, according to claimant, gave rise to a great deal of stress given the costs associated with this prosthesis.<sup>16</sup> This increase in symptoms is reflected in the medical records and remains uncontroverted.

The majority of the Board has considered this issue and finds no reason to deviate from either the ALJ's original decision or the previous opinion made by a single Board Member. Claimant's loss of her prosthesis, under these facts and circumstances, is more like an unexplained event and more like normal wear and tear of the prosthesis rather than a new and independent accident which arose out of and in the course of her employment with Wal-mart. While the cold *might* have played a part in the loss of her prosthesis, claimant was not sure that the prosthesis came off while she was in the cold area of the store. And while it is clear the prosthesis came off between 5 and 6 a.m. while claimant was at work for Wal-mart, it might have come off outside the cold area for an entirely separate reason wholly unrelated to anything having to do with her work activities. Claimant is the only one who has testified on this issue and she is uncertain as to how and when she lost it other than to isolate a single hour of the workday. Without more definitive evidence that supports the assertion that it was the cold that led to the shrinkage around the prosthesis allowing it to come off, the Board is unwilling to accept respondent's assertion that Wal-mart should be responsible for the cost to replace the lost prosthesis

---

<sup>14</sup> Board Order, 2008 WL 2002925 (Apr. 11, 2008) at 2.

<sup>15</sup> R.H. Trans. at 71.

<sup>16</sup> R.H. Trans. at 21.

under K.A.R. 51-9-2 . Accordingly, it was proper to find respondent responsible for the cost to replace claimant's prosthesis that was lost while working at Wal-mart.

It is noted that respondent's carrier has been less than helpful in connection with claimant's need for a prosthesis. Claimant's allegations with respect to her treatment on this issue at the carrier's hands is uncontroverted. The Board suggests that such conduct is inappropriate and could well be considered a fraudulent and abusive act.<sup>17</sup> Put simply, respondent does not have the right to unilaterally dictate to claimant how many prostheses she may be entitled to. And in doing so, the carrier has only complicated claimant's condition. In the future, cooperation will go a long way in aiding claimant's confidence in the workers compensation system.

### **AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Marcia Yates Roberts dated December 3, 2009, is affirmed in part and modified in part as follows:

The claimant is entitled to 4.00 weeks of temporary total disability compensation at the rate of \$403.28 per week or \$1,613.12 followed by 107.90 weeks of permanent partial disability compensation at the rate of \$403.28 per week or \$43,513.91 for a 26 percent permanent partial disability, making a total award of \$45,127.03.

As of March 31, 2010 there would be due and owing to the claimant 4.00 weeks of temporary total disability compensation at the rate of \$403.28 per week in the sum of \$1,613.12 plus 107.90 weeks of permanent partial disability compensation at the rate of \$403.28 per week in the sum of \$43,513.91 for a total due and owing of \$45,127.03, which is ordered paid in one lump sum less amounts previously paid.

Respondent is ordered to pay for the replacement of claimant's prosthetic finger that was lost in November 2007.

---

<sup>17</sup> K.S.A. 44-5,120.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of April 2010.

---

BOARD MEMBER

---

BOARD MEMBER

---

BOARD MEMBER

**CONCURRING AND DISSENTING OPINION**

The undersigned agrees with the majority's factual findings and its determination that claimant is entitled to compensation for both her hand impairment and for her PTSD condition. However, this member disagrees with the majority's conclusion that the claimant's percentage of functional impairment for her scheduled injury to her hand should be combined with her percentage of whole body functional impairment for her psychological impairment for a single permanent partial disability award based upon the total of all her impairments. Claimant has a 15 percent permanent partial loss of use of her right hand. Compensation for this disability is controlled by K.S.A. 44-510d(a)(11). Claimant also has a 20 percent permanent impairment of function for her PTSD. The compensation for this disability is controlled by K.S.A. 44-510e(a). The majority should follow the mandates in *Casco* and not convert claimant's 15 percent hand impairment to an 8 percent whole body impairment and calculate claimant's permanent partial disability compensation under K.S.A. 44-510e.

Scheduled injuries are the general rule and nonscheduled injuries are the exception. K.S.A. 44-510d calculates the award based on a schedule of disabilities. If an injury is on the schedule, the amount of compensation is to be in accordance with K.S.A. 44-510d.

...  
K.S.A. 44-510e permanent partial disability is the exception to utilizing 44-510d in calculating a claimant's award. K.S.A. 44-510e applies only when the claimant's injury is not included on the schedule of injuries.<sup>18</sup>

---

<sup>18</sup> *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, Syl. ¶¶ 7, 10, 154 P.3d 494 (2007).

Both the hand and psychological injuries occurred as a direct result of a work-related accident. Nevertheless, claimant's hand injury is contained within the schedule of injuries in K.S.A. 44-510d. Therefore, claimant's permanent partial disability resulting from her hand injury is compensable as a separate scheduled injury based upon her percentage of functional impairment for that injury alone. Likewise, claimant's permanent partial disability resulting from her psychological injury is compensable as a separate general body disability based upon her percentage of functional impairment for that injury alone. The percentage of impairment for the hand should not be converted to a whole body impairment and added to the whole body impairment for the psychological injury and thereby compensated under K.S.A. 44-510e. I would calculate claimant's permanent partial disability award as follows:

Scheduled injury to right hand

The claimant is entitled to 22.50 weeks of permanent partial disability compensation, at the rate of \$403.28 per week, in the amount of \$9,073.80 for a 15 percent loss of use of the hand, making a total award of \$9,073.80.

General body disability for PTSD

The claimant is entitled to 4.00 weeks of temporary total disability compensation at the rate of \$403.28 per week or \$1,613.12 followed by 83.00 weeks of permanent partial disability compensation at the rate of \$403.28 per week or \$33,472.24 for a 20 percent functional disability, making a total award of \$35,085.36.

---

BOARD MEMBER

c: Kevin J. Kruse, Attorney for Claimant  
Stephen P. Doherty, Attorney for Respondent and its Insurance Carrier  
Marcia Yates Roberts, Administrative Law Judge